No. 77-1217

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES SIMKOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. 2).

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1978, and a petition for rehearing was denied on February 14, 1978. The petition for a writ of certiorari was filed on March 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to be represented at trial by two disbarred attorneys.

2. Whether comments to the jury by the district court and the prosecutor concerning petitioner's desire to be represented by two disbarred attorneys constituted reversible error.

3. Whether petitioner's conviction should be reversed because of alleged defects in the service of the summons following his indictment or in his arraignment.

4. Whether the district court erred in refusing to suppress bank records obtained through use of Internal Revenue Service summonses.

5. Whether the evidence was sufficient to support petitioner's convictions.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of willfully failing to file personal income tax returns for the years 1970-1972, in violation of 26 U.S.C. 7203 (App. 5a-7a, 159a-160a).[1] He was sentenced to two years' imprisonment and was fined a total of $22,500 (*id.* at 172a-173a). The court of appeals affirmed (Pet. 2).

The evidence at trial established that petitioner, a chiropractor, filed income tax returns correctly reporting his income for the years 1967 and 1968 but then failed to file proper returns for the subsequent seven-year period, 1969 through 1975 (App. 69a-73a). For 1969, petitioner filed the front page of a Form 1040 showing only his name, address, social security number, and occupation (*id.* at 115a). Attached to the form was material indicating petitioner's belief that only gold and silver coins were lawful money. Petitioner reported that he had received ten

[1]"App." refers to the appendix filed in the court of appeals.

dollars in silver dimes in 1969. The Internal Revenue Service returned these documents to petitioner with a letter advising him that it was not a proper tax return, requesting that he file a proper return, and warning that if he did not do so he might be subject to criminal prosecution (*id.* at 115a-116a). Petitioner nonetheless failed to file a proper return (*id.* at 116a).

Petitioner also did not file a tax return for the year 1970 (App. 116a-117a). For 1971 and 1972, petitioner filed documents similar to those he filed for 1969, reporting that he had received $525 in silver dimes in 1971 and $30 in silver quarters and $18 in silver dimes in 1972 (*id.* at 117a-118a). These materials were again returned to petitioner with letters similar to that sent him after receipt of the materials filed for 1969 (*id.* at 118a-119a).

The evidence established that petitioner received a gross income of $40,658.12 in 1970, $36,887.51 in 1971, and $26,502.20 in 1972 (App. 127a-133a).

ARGUMENT

1. Petitioner argues at great length (Pet. 11-40) that the district court erred in refusing to permit him to be represented by two disbarred attorneys, Jerome Daly and Gordon Peterson. But the court's ruling was correct, since it has consistently been held that a defendant has no right to be represented by a person not licensed to practice law. See, *e.g.*, *United States* v. *Pilla*, 550 F. 2d 1085, 1093 (C.A. 8), certiorari denied, 432 U.S. 907; *United States* v. *Afflerbach*, 547 F. 2d 522, 525 (C.A. 10), certiorari denied, 429 U.S. 1098; *United States* v. *Kelley*, 539 F. 2d 1199, 1201-1203 (C.A. 9), certiorari denied, 429 U.S. 963; *United States* v. *Jordan*, 508 F. 2d 750, 753 (C.A. 7), certiorari denied, 423 U.S. 842. Petitioner's reliance (Pet. 14-15, 24-26, 29) upon *Faretta* v. *California*, 422 U.S. 806, is misplaced. *Faretta* established only that a defendant in a criminal case has the right to represent himself without

the assistance of an attorney; it did not grant a defendant the right to be represented by a person who is not a member of the bar. See *United States* v. *Wilhelm*, 570 F. 2d 461, 466 (C.A. 3).

2. Petitioner also asserts (Pet. 44-45) that he was prejudiced by the district court's and prosecutor's references to the fact that he desired to be represented by the disbarred attorneys. The court's remarks, however, were intended merely to explain to the jury why petitioner was not being assisted by counsel and were made in direct response to petitioner's repeated statements that the court had deprived him of his right to counsel and that he was not qualified to represent himself (App. 73a-74a, 77a, 79a, 106a-107a).[2] Nor was there anything objectionable about the prosecutor's remark, made at the outset of his closing

[2]For example, after the prosecutor had examined the first government witness and the district court had indicated that petitioner could cross-examine the witness, the following colloquy occurred (App. 73a-74a):

> MR. SIMKOVICH: Your Honor, I know that my counsel, Jerome Daly and Gordon Peterson, know what to say and what questions to ask. I do not know what to say, I am not qualified.
>
> THE COURT: You may cross examine at this time, if you wish. Members of the Jury, in case you don't understand the problem we have here, the defendant has two attorneys from outside the State whose names have been stricken from the rolls in their home states and, hence, under our rules are not authorized to appear in this Court and we have so ruled with respect to them. We have told the defendant in some of the opening statements that he is free to engage the services of any Member of the Bar who is admitted to practice in this District in accordance with our rules and he has not seen fit to do so and he has been further told that if he is indigent we have ample means, the Government will supply an attorney for him if he can file the necessary statements to show that he is indigent, without assets to hire an attorney and this has not been done. And so we have ruled that he has, therefore, waived his rights to the assistance of counsel and the only thing we can do is proceed in this manner, giving him in this case all the rights he has if he

argument, "that this trial has been unusual because the defendant has insisted throughout that he has the right to be represented by two individuals who have been disbarred as attorneys" (App. 138a). The comment was nothing more than a harmless statement of the obvious, since the jury already was well aware of petitioner's insistence that Daly and Peterson be allowed to represent him.[3]

3. Petitioner contends (Pet. 41-44) that the summons issued after he had been indicted was improperly served upon him by mail and that he was illegally arraigned before a magistrate. These claims were correctly rejected by the court of appeals and do not warrant further review.

Rule 4(d)(3) of the Federal Rules of Criminal Procedure, as incorporated by reference into Rule 9(c)(1), provides that "[t]he summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address." Service of a summons solely by mail, as occurred in this case, obviously does not comply with the rule, but petitioner appeared in response to the summons, posted bond (App. 2a), and subsequently appeared for trial. The district court thus had jurisdiction over petitioner regardless of any defects in the procedure by which he was

> wanted to represent himself, which he has the right to do if he chooses. Under the decisions of the U.S. Supreme Court a person is entitled to represent himself or to be represented by an attorney duly admitted to practice in this District. He has not come forward with any such attorney either as an indigent or some attorney that he has engaged and so that is the reason why we are proceeding in this manner.

[3]Indeed, it was petitioner who had first brought the matter to the attention of the jury during *voir dire* (April 11, 1977, Tr. 4-6).

brought into the presence of the court. See, *e.g.*, *Frisbie* v. *Collins*, 342 U.S. 519, 522; *Ker* v. *Illinois*, 119 U.S. 436, 444; *United States* v. *Lovato*, 520 F. 2d 1270, 1271 (C.A. 9), certiorari denied, 423 U.S. 985; *United States* v. *Andreas*, 458 F. 2d 491, 492 (C.A. 8), certiorari denied, 409 U.S. 848.

By the same token, there is nothing to petitioner's assertion that he was improperly arraigned before a magistrate. Although Rule 9(b)(2), Fed. R. Crim. P., provides that the summons shall require "the defendant to appear before the court or, if the information or indictment charges a minor offense, before a United States magistrate at a stated time and place," and although petitioner was not charged with a minor offense, 28 U.S.C. 636(b) permits district judges to delegate to magistrates certain pretrial functions in criminal cases. Rule 6(c) of the Rules of the United States District Court for the Western District of Pennsylvania (United States Magistrates) expressly authorizes magistrates to "[c]onduct arraignments in cases not triable by the Magistrate to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere and ordering a presentence report in appropriate cases." See *Carter* v. *United States*, 388 F. Supp. 1334, 1337-1338 (W.D. Pa.), affirmed, 517 F. 2d 1397 (C.A. 3). Moreover, even assuming that petitioner was improperly arraigned before a magistrate, a not guilty plea was entered on his behalf and he was then tried by the district court without raising any further objection to the arraignment. See, *e.g.*, *Garland* v. *Washington*, 232 U.S. 642, 646-647; *Thomas* v. *United States*, 455 F. 2d 469, 470 (C.A. 5), certiorari denied, 409 U.S. 859; *Sweeney* v. *United States*, 408 F. 2d 121, 123 (C.A. 9). Petitioner, in any event, has not asserted that he was prejudiced by the manner in which he

was arraigned. See *Garland* v. *Washington*, *supra*, 232 U.S. at 644-645; *United States* v. *Rogers*, 469 F. 2d 1317, 1317-1318 (C.A. 5).[4]

4. Petitioner claims (Pet. 45-53) that the Internal Revenue Service violated his rights when it obtained bank records through use of administrative summonses issued without notice to him. But an I.R.S. summons for the production of bank records does not violate the customer's Fourth Amendment rights (see *United States* v. *Miller*, 425 U.S. 435, 440-443), nor does it infringe upon the customer's Fifth Amendment privilege against self-incrimination (*California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55).[5] Furthermore, at the time that the summonses in this case were issued, there was no requirement that a bank customer be notified of the request. See *United States* v. *Continental Bank and Trust Co.*, 503 F. 2d 45, 49 (C.A. 10). See also *United States* v. *Miller*, *supra*, 425 U.S. at 443 n. 5.[6]

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[4]Petitioner also asserts (Pet. 41, 44) that he was not arraigned within 10 days of the filing of the indictment, as required by 18 U.S.C. (Supp. V) 3161(c). The indictment was filed on December 7, 1976, and petitioner was arraigned on December 27, 1976. The Speedy Trial Act imposes no express sanction for a delay in arraignment, however, and petitioner has shown no prejudice from the delay. Hence, he is not entitled to dismissal of the indictment. See *United States* v. *Butler*, 434 F. 2d 243 (C.A. 1), certiorari denied, 401 U.S. 978.

[5]Contrary to petitioner's assertion (Pet. 51), it was a Fifth Amendment challenge to the reporting requirements of the Bank Secrecy Act of 1970, 84 Stat. 1114, not to the recordkeeping requirements of the Act that petitioner challenges (Pet. 51-52), which this Court viewed as premature in *California Bankers Assn.* v. *Shultz*, *supra*, 416 U.S. at 71-75.

[6]Notice to a taxpayer is now required by 26 U.S.C. 7609(a), as added by Section 1205(a), Tax Reform Act of 1976, Pub. L. 94-455,

Petitioner also argues (Pet. 46-47) that the summonses were improperly employed solely to further a criminal investigation. The question when the Internal Revenue Service may utilize an administrative summons in aid of a criminal investigation is currently before the Court in *United States* v. *LaSalle National Bank*, No. 77-365, argued March 29, 1978, but there is no need to hold this petition pending a decision in that case. The district court concluded, after an evidentiary hearing, that the summonses had been issued prior to the time that the special agent determined to recommend a criminal prosecution and at a time when the investigation was continuing for both civil and criminal purposes (App. 46a-47a). Thus, even under the restrictive and, we believe, incorrect standard applied by the Seventh Circuit in *LaSalle National Bank* (554 F. 2d 302), the summonses in this case were proper.

5. Finally, there is no merit to petitioner's contention (Pet. 53-55) that the evidence was insufficient to support the verdict. Although petitioner asserts (Pet. 53) that he was "charged with failing to file a return and swearing under criminal penalties that it [was] perfect * * *" and that there was no evidence that his records were adequate to enable him to file a return that was complete and correct, the government need only prove in a prosecution under 26 U.S.C. 7203 that the defendant had sufficient gross income to require him to file a return, that he knew of his obligation to file a return, and that he willfully failed to comply with that obligation within the time

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90 Stat. 1699, when the I.R.S. serves summonses on certain third-party recordkeepers. That Section became effective on February 28, 1977 (Section 2(b), Pub. L. 94-528, 90 Stat. 2483), well after the dates of the summonses here (App. 46a).

Jenkins v. *McKeithen*, 395 U.S. 411, on which petitioner relies (Pet. 47-49), is not to the contrary. That case involved a due process challenge to the notice rules of a commission that clearly exercised an adjudicatory function. The function performed by the Internal Revenue Service is purely investigatory, a situation that the Court explicitly distinguished in *Jenkins* (395 U.S. at 426-427).

allowed by law. *United States* v. *Matosky*, 421 F. 2d 410, 413 (C.A. 7), certiorari denied, 398 U.S. 904.[7] The proof at trial plainly satisfied that burden.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

M. CARR FERGUSON,
Assistant Attorney General.

ROBERT E. LINDSAY,
Attorney.

MAY 1978.

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[7]Petitioner's claim (Pet. 54-55) that the tax filing requirement violates the Fourth Amendment and that Section 7203 accordingly is unconstitutional is frivolous. The statute requiring the filing of tax returns (26 U.S.C. 6012) is a reasonable and proper exercise of the constitutional power of Congress to lay and collect taxes (Article I, Section 8) and obviously does not involve an unreasonable search or seizure. Cf. *United States* v. *Acker*, 415 F. 2d 328, 329 (C.A. 6), certiorari denied, 396 U.S. 1003.

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